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No. 192.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JOHN J. ALLEN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Assistant Attorney.

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STATEMENT OF CASE.

From January, 1886, to January, 1892, appellant was a commissioner of the Circuit Court of the United States for the Eastern District of New York. He was also chief supervisor of elections in and for said judicial district. During this period he performed certain services, as such commissioner, in connection with the prosecution of alleged violators of the provisions of chapter 7, title, "Crimes," Revised Statutes of the United States. Certain of his accounts for said services having been disallowed by the accounting officers, he brought suit in the Court of Claims February 1, 1892, to recover the same. On February 20, 1896, the United States filed a counterclaim for the sum of $3,120, which it was alleged had been wrongfully and un-

lawfully paid appellant by the defendants' accounting officers.

On January 9, 1905, final judgment was entered by the Court of Claims, in which certain items claimed were disallowed and the counterclaim aforesaid was allowed. From this judgment the claimant below appealed.

ARGUMENT.

The first error assigned is as to the disallowance of part of items 1 and 2 and all of items 11, 20, and 23 of the third finding of fact.

1. Item 1, it is found by the Court of Claims, is for drawing complaints of affiants in various criminal cases for offenses against the laws of the United States, 3,915 folios, at 20 cents per folio. 3,548 of said folios were charged in cases where the complaints set forth offenses under chapter 7, title "Crimes," Revised Statutes, and in which cases "warrants, if issued, were never served because inquiry developed no offense had been committed." (Rec., pp. 7 and 8.) The accounting officers allowed 15 cents per folio for said complaints and appellant now claims 5 cents additional, or $177.40.

It will be conceded that in the prosecution of ordinary criminal cases Circuit Court commissioners were entitled to 20 cents per folio for drawing complaints as for "taking and certifying depositions to file." (Sec. 847, R. S.; *United States* v. *Barber,* 140 U. S., 164.) But by virtue of section 1986, Revised Statutes, detailed fees as prescribed for commissioners in said section 847 are not allowable where the proceedings before the commissioners were for violation of

the provisions of said chapter 7, title "Crimes," Revised Statutes of the United States. (See also sec. 1982, R. S.)

It will be noted that section 1986 provides a fee of $10 for the commissioner's services "in each case, *inclusive of all services incident to the arrest and examination,*" where the offense charged is a violation of some one or more of the provisions of said chapter 7, title "Crimes." The drawing of the complaints charged for in this item was a service incident to the arrest and examination. But there was no arrest or examination. It has been held by this court that under such circumstances there is no "case" within the meaning of section 1986; that the mere filing of a complaint and the issuing of a warrant thereon is not sufficient to entitle the commissioner to the $10 prescribed for his services "in each case." (*Southworth* v. *United States,* 151 U. S., 179-185.)

But appellant insists that the decision of the court in the *Southworth* case does not preclude the commissioner from charging and receiving the fees prescribed in section 847 for such services as were rendered in good faith. It is our contention that said section 1986 provides an *exclusive* fee for the commissioner in all cases where the offense charged is a violation of the provisions of said chapter 7, and that he can not legally receive *any* compensation whatever in any case brought under said chapter unless the proceedings have advanced far enough to make it a "case" within the definition given by the court in the *Southworth* case. The question of whether the commissioner acted in good faith in drawing the complaints does not enter in. It does not follow that because in good faith he performed some service in these matters under circumstances which preclude the payment of the statutory fee of $10 he must be paid

something therefor. Not every service which is required of a public officer is to be paid for. "Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor any discretionary action on the part of the officials." (*United States* v. *Shields*, 153 U. S., 88.) See also *United States* v. *Patterson* (150 U. S., 65-69).

The commissioner in this case had control over the matter of drawing complaints. He was not compelled to draw a complaint in every case in which it was reported or represented to him that an offense had been committed. It was his duty before drawing a complaint to satisfy himself of the probability of the commission of the offense alleged. He had the means at hand to satisfy himself on this point, from the fact that he was also chief supervisor of elections at the time, and as such had in his hands, or at his command, lists containing the names of all persons entitled to vote. Before drawing a complaint against any individual alleging a violation of any of the provisions of said chapter 7 he could have known at once, by reference to said lists, where the individual charged was registered and whether or not there was any probability of convicting him of an offense under said provisions of the law. That he did not make such investigation is manifest from the fact that in many, if not all, of the cases in which these services were performed warrants were not issued at all, and if issued, were never served "because inquiry developed no offense had been committed." The inference is irresistible that a complaint was drawn in every instance where it was by any possibility suggested that an offense had been committed, and that the

investigation, which should have preceded the drawing of the complaint, was not made until subsequent thereto.

However, we rely upon the proposition above indicated, that he is not entitled to *any* compensation for services rendered in proceedings of this kind unless there was an arrest and examination.

If the contention of the United States is correct, it follows that the payment of 15 cents per folio made to appellant for complaints was erroneously and unlawfully made. The amount thereof is included in the counterclaim.

Item 2 is for drawing jurats to complaints of affiants charging offenses against the laws of the United States. Two thousand one hundred and ninety-two of said jurats were to complaints where the offense charged was under said chapter 7, title "Crimes." Warrants, if issued thereon, were never served. No arrests were made, because inquiry developed the fact that no offense had been committed. (Rec., p. 8.)

Under the provisions of section 847, the Circuit Court commissioner was entitled to 15 cents for the jurat to each oath in ordinary criminal proceedings, but, for the reasons before given, appellant is not entitled to any compensation whatever for the jurats charged.

Item 11 (Rec., p. 9) is for certifying complaints in various criminal proceedings for violation of the elective franchise, with the records pertaining thereto, in connection with the Congressional elections of 1886, 1888, and 1890, for transmittal to the chief supervisor of elections, to be filed by him as records of his office. One folio was charged in each case at 15 cents per folio.

It is found by the court in connection with this item that the appellant was at the same time the commissioner who

certified and the chief supervisor of elections to whom he certified said complaints. Section 2027, Revised Statutes, requires that the commissioner who performs any duties relating to, concerning or affecting the election of Representatives or Delegates in Congress shall forward to the chief supervisor in and for the judicial district the *original* complaints, etc. There was, therefore, manifestly no necessity for certificates to these complaints and other papers.

The only possible excuse for a certificate to these papers would be to advise the chief supervisor, to whom they were forwarded, that the papers so forwarded were original papers. When we consider that the appellant here was both the commissioner who pretends to have certified the complaints and records pertaining thereto and the chief supervisor to whom the certificate would go, the absurdity of the matter is obvious. He must have known, in his capacity as chief supervisor, just what the papers were as well as he knew it in his capacity as commissioner.

These complaints and other papers must necessarily have been a part of the record or related directly to "cases" pending before the commissioner for alleged commission of offenses under said chapter 7. Their transmission to the chief supervisor was incident to the services for which a fee of $10 is prescribed by section 1986.

Item 20 (Rec., p. 9) is for filing and entering 2,180 separate complaints and warrants of arrest issued for violation of the election laws in connection with the Congressional elections of 1888 and 1890, where the warrants were returned unexecuted by the marshal, at 10 cents each, $218.

All of these services were rendered in cases where the offense charged was a violation of some one or more of the

provisions of chapter 7, title "Crimes," Revised Statutes. The disallowance by the Court of Claims of this item should be sustained, for the reasons heretofore stated.

Item 23 (Rec., pp. 9 and 10) is for drawing depositions for complaints in various cases of illegal registration—4 folios in each case, at 20 cents a folio; oath to affiant, 10 cents; drawing jurat to same, 15 cents; filing complaints, 10 cents each, $742.20.

These services were all charged in civil rights proceedings. As the result of scrutiny of the lists of voters by the commissioner and inquiry at residences, no warrant in any of said instances was issued. For the reasons already stated in connection with the preceding items the disallowance should be sustained, but aside from that it is a service which could not be paid for in any case, whether the proceedings were brought under the civil rights act or under the general provisions of the statute regulating criminal proceedings. (See *Patterson case,* 150 U. S., 65.)

2. The second error assigned is the refusal of the Court of Claims to render judgment in favor of the claimant in the amount claimed in the items above indicated. It follows, as a matter of course, that if the conclusion of law made by the court below disallowing charges made under said items was correct, the refusal to render judgment in favor of the claimant was correct.

THE COUNTERCLAIM.

The third assignment of error is the allowance of the counterclaim filed by the United States.

The fourth finding of fact (Rec., p. 10) relates to the counterclaim. It appears therefrom that the sum which the United States now seeks to recover from appellant was originally charged by him for drawing and filing complaints and for issuing and entering return of marshal on warrants in cases where the offense charged was a violation of the provisions of chapter 7, title "Crimes," and in which no arrests were made in any instance and no examination was held. The fees allowed by the accounting officers were the detailed fees prescribed by sections 847 and 828, Revised Statutes. The court below, in its conclusions of law, held that the defendants, the United States, are entitled to recover judgment on said counterclaim "because of charges illegally and by mistake paid" to the appellant.

The first question which presents itself for solution in connection with this counterclaim is the validity of the act or acts of the accounting officers in paying said charges. The court will have reached a conclusion as to this question in the consideration of the first item referred to in the appellant's first assignment of error. Should the decision be that the Court of Claims was in error in disallowing the charges for drawing complaints in proceedings brought under the "election" law, it follows that the court was also in error in allowing the counterclaim. If, on the other hand, the decision should sustain the action of the court below with reference to said item 1, its action in allowing the counterclaim must be likewise sustained, unless, as is

contended by the appellant, said court had no jurisdiction to entertain the counterclaim.

It is well settled that the United States is not bound by the unauthorized and unlawful acts of its officers and agents, and that money paid to an officer or to anyone else in violation of law—that is to say, without authority of law—can be recovered back. Neither is there any statute of limitations against the United States. Such right of action is not limited by time, nor place, nor circumstances. The Government can go into any court having jurisdiction of the person or property of the person so unlawfully receiving money and recover it.

> *United States* v. *Burchard* (125 U. S., 176-180).
>
> *Wisconsin Central R. R. Co. United States* (164 U. S., 190).
>
> See also authorities cited by the Court of Claims in its opinion (Rec., p. 20).

The Court of Claims has jurisdiction, by virtue of the first section of the Tucker Act (24 Stat. L., 505), to consider and determine—

> All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against the Government in said court.

Any person who invokes the jurisdiction of said court for his own purposes thereby submits himself to its jurisdiction. It does not matter whether appellant voluntarily opened the accounts upon which the counterclaim is based, or whether a *running* account existed between the appellant

and the United States, or whether the subject of the counterclaim arose out of the same subject-matter as the suit against the United States; the Court of Claims has jurisdiction to entertain and adjudicate any "demands whatsoever" which the Government may have against the party bringing the suit in the Court of Claims. (*Atlantic Contracting Company*, 35 C. Cls. R., 30.)

The payment to the appellant of the $3,120 named in the counterclaim was, we believe, a mistake of law. If so, the right to recover back was a "demand," within the meaning of that part of the first section of the Tucker Act above quoted.

The appellant argues in his brief (p. 26) that the record does not show any evidence that the court which approved the accounts of the appellant made a mistake in so doing, and that, therefore, the approval must be accepted as conclusive and binding upon the United States. In support of this contention, *Jones* (134 U. S., 483), *Barber* (140 U. S., 179), and *Nix* (189 U. S., 206) are cited.

It is submitted that in effect these decisions simply declare that the approval by the court of the account of an officer is *prima facie* evidence of the fact that the services therein charged for were performed, a fact which was not disputed in this case, and that the fees claimed for such services were the fees named in the account. It is not held by said decisions that the approval of the account establishes *prima facie*, the validity or legality of the charges made in the account. That is a matter which is left for the determination of the accounting officers or of the Court of Claims, in which only can a suit for fees and compensation be brought by public officers.

During the pendency of this appeal counsel for appellant made an application for a writ of certiorari to be issued to the Court of Claims, directing it to send up certain evidence and records which were before it in the trial of this cause, the effect of which, it was alleged, would be to convince this court that the Court of Claims was in error with respect to the second finding, second and third paragraphs (Rec., p. 7); also that the court was in error in finding that the sum named in the counterclaim had been paid "by mistake," as stated in the fourth finding of fact (Rec., p. 10).

This court declined to issue the requested writ of certiorari, and counsel for appellant apparently seeks now to accomplish what they then failed to do—get said evidence and records before this court—by including the same as appendices to the brief for appellant.

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